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No. 94-1588

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE BUCKEYE UNION INSURANCE COMPANY,

Petitioner,

v.

EUGENE A. LEBER, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 1995

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MISSTATEMENTS IN BUCKEYE'S PETITION

Pursuant to Rule 15.1 of this Honorable Court, Respondents note the following misstatements of fact and law in the petition of Buckeye Union Insurance Company ("Buckeye") which have a bearing on those issues which would properly be before the Court if certiorari were granted. The misstatements of fact and law are:

(1) Buckeye improperly designates respondents as Eugene A. Leber, Richard P. Leber and June M. Leber. The respondents also include the Board of County Commissioners of Erie County, Ohio.

(2) Buckeye misstates the Record when it neglects to discuss or to append to its petition the August 10, 1987 declaratory judgment of the trial court on the critical issue of available and applicable insurance coverage -- a judgment reinstated, in all respects, by the Ohio Supreme Court (Appendix 3 herein).

(3) Buckeye misstates the Record by its failure to discuss or to append to its petition the July 27, 1984 judgment of the trial court -- entered after the close of all of the evidence at the first trial. That judgment imposed respondeat superior liability on the Board of Erie County Commissioners for the negligence of the Sheriff and the deputy who shot Eugene Leber (Appendix 1 herein). Because this was a legal determination, the jury was not asked to determine whether the Board was negligent. Cf. Petition at 4.

(4) Buckeye falsely represents that only the Erie County Sheriff's Department was found liable in the first trial. In fact, the deputy and the Board of Erie County

Commissioners were found liable as well. Gene Leber was found fault-free (Appendix 2 herein).

(5) Buckeye's characterizations -- as to insurance coverage, settlements and their impact, and other events relating to this action -- are materially inconsistent with the unanimous jury verdicts and trial court judgments in this action -- verdicts and judgments reinstated, in all respects, by the Ohio Supreme Court. For example, Buckeye contends, at 5, that there was only $1 million in applicable coverage and that the trial court, somehow, mysteriously found $2 million in applicable coverage. Buckeye ignores the fact that it insured multiple defendants and that there were two, separate $1 million coverages available: (a) comprehensive general liability; and (b) automobile liability (Appendix 3 herein).

(6) While Buckeye, for the first time in this Court, launches a due process challenge to Ohio Rule of Appellate Procedure 12 (A) (see, e.g., Petition at 8, 14, 16, 18) -- it never challenged the Rule, on any basis or at any time, in the state courts. Buckeye's challenge is vacuous in any event. Buckeye continuously argues that the appellate court never considered its assigned errors. The very language of the court of appeals' decision, on remand, belies Buckeye's claim. The Ohio appellate court did **not**

deem any of Buckeye's assigned errors "moot". The appellate court "considered" each error and found each "not well taken". Petition at 30a. The appellate court accorded Buckeye due process and full appellate review.

(7) While Buckeye brands the Ohio Supreme Court's disposition "unexpected" and "extraordinary" -- it was neither unexpected nor extraordinary from either respondents' perspective or, certainly, the Ohio Supreme Court's perspective. Respondents, Gene Leber and the Board of Erie County Commissioners, were highly confident of Ohio Supreme Court reinstatement of their jury verdicts and trial court judgments against Buckeye because they knew that Buckeye acted in bad faith and with actual malice (Appendix 4 herein). The Ohio Supreme Court simply reinstituted the jury verdicts and all of the trial court's judgments. Buckeye had, and exercised, a full and fair opportunity to be heard on each of the issues which it raised -- not only in the Ohio Supreme Court and court of appeals, but in the trial court in the first instance.

(8) The Lebers did not settle their claims against Erie County for $2 million, as Buckeye's Petition inexplicably claims, at 4 and 12. The Lebers settled their claims against Erie County for $2 million plus an

assignment of all of Erie County's rights against Buckeye on the full amount of the judgment. See Petition at 3a. Buckeye's Petition, at 4, characterizes the assignment as "unusual". But no Ohio court agreed. Such assignments are routinely employed where, as here, the insurer acts with such bad faith that it constitutes actual malice.

(9) Buckeye's claim, at 10, that two dissenting Ohio Supreme court justices stated that Buckeye had been deprived of due process, is misleading. Those two dissenting justices made that statement when referring to the trial court's decision to allow respondents' bad faith claim to go to the jury (Petition at 18a-19a). The statement by the dissenters had **nothing** to do with the due process issue framed by Buckeye.

(10) Buckeye's petition contends, at 5, that the action against it was a new lawsuit. Buckeye is wrong. The instant action is a continuation of the same legal action, under the same case number, that was begun in 1983.

Various other misstatements of fact and law pervading Buckeye's petition are noted infra. Before embarking on that discussion, two remaining points must be noted. **First**, Buckeye's pejorative references, to the Ohio Supreme Court's decision as an "aberrant process" (Petition at 11) and a "judicial shell game" (Petition at 14),

and Buckeye's pejorative references to the sizable judgment -- entered in favor of a fault-free paraplegic plaintiff and a County driven to the verge of bankruptcy by insurer bad faith and actual malice -- as a "windfall" (Petition at 18) -- have no place in this Honorable Court. While Buckeye's petition mentions its ultimate liability for $23 million[1] on no less than seven occasions, Buckeye mentions Gene Leber's permanent paraplegia not once. Buckeye also fails to note that, by virtue of the jury verdicts, the trial court judgments, and the Ohio Supreme Court's decision, Erie County recovered the $2 million it had paid to Gene Leber, plus interest -- thus averting bankruptcy.

Second, while Buckeye no longer erroneously refers to itself as Buckeye Union **Life** Insurance Company, as it did in its application to extend the time for filing its petition, Buckeye's petition is riddled with other factual and legal misstatements. These errors stem from petitioner's counsel's unfamiliarity with the Record.

Buckeye's Ohio appellate counsel did not represent Buckeye at trial. Buckeye's present counsel of record did not represent Buckeye in any Ohio state court proceeding. On the other hand, respondents' counsel of record at trial, throughout the appellate process, and in this Court, is one and the same.

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[1] In fact, $10.15 million represented the jury's determination as to the extent of Gene Leber's injuries (Appendix 2 herein). The other nearly $13 million represented pre- and post-judgment interest resulting from Buckeye's interminable litigation.

REASONS FOR DENYING THE PETITION

I. This Pure State Law Case Presents No Federal Question.

This is a very complicated case, factually and procedurally.[2] Its genesis was the negligent shooting, by a deputy sheriff, 16 years ago. Eugene Leber was shot through the back and rendered paraplegic on April 7, 1979. As he exited his police cruiser and approached Eugene's parked car, the Erie County, Ohio deputy slipped on ice and accidentally discharged his weapon. The bullet pierced Eugene's car, entered his back and rendered the 18 year-old young man permanently paraplegic. Eugene Leber is now 34 years old.

Eugene Leber filed suit against the insureds of Buckeye Union Insurance Company ("Buckeye") in federal district court. The district court held that Eugene failed to state any federal claim and declined to exercise jurisdiction over the pendent state claims, which Eugene Leber subsequently refiled in state court. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. Leber v. Smith, 773 F.2d 101 (6th Cir. 1985), cert. den. 475 U.S. 1084 (1986).

Eugene's state law claims resulted in a state court judgment against Buckeye's insureds -- on purely state law grounds. Following a lengthy state court trial in 1984, a unanimous jury determined that the negligence of Buckeye's insureds proximately caused 18 year-old

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[2] Fully one-half of Buckeye's 20-page petition is devoted to factual recitation.

Eugene Leber's permanent paraplegia and awarded him compensatory damages (Appendices 1-2 herein). Thereafter, Eugene and Buckeye's insureds -- including Erie County, Ohio, filed a statutory supplemental proceeding, a declaratory judgment action, a taxpayer's action and an insurer bad faith claim against Buckeye -- all predicated, exclusively, on Ohio law. Following a 1987 trial -- the longest in Erie County, Ohio, history,[3] jury verdicts and trial court judgments were rendered in favor of Eugene and Erie County, Ohio, against Buckeye. In response to Buckeye's own special interrogatories, the jury unanimously found that Buckeye Union Insurance Co. had engaged in bad faith insurer misconduct **and** had acted with **actual** malice (see Appendices 3-4 herein). The verdict and judgments of the trial court were reinstated, in all respects, by the Ohio Supreme Court on October 19, 1994. Leber v. Smith (1994), 639 N.E.2d 1159, 70 Ohio St.3d 548.

Buckeye has been a party to this litigation for a decade. Yet Buckeye never raised a single federal question: (1) before the state trial court, which entered final judgment against it in 1987; (2) before the state court of appeals, which entered judgments in 1989, 1992 and 1993; or (3) before the Ohio Supreme Court, which decided the merits of the cause on October 19, 1994. Federal law had no role, central, or even tangential, in any aspect of the state court, state-law-based litigation against Buckeye.

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[3] The Record in this action exceeds 9,000 pages.

II. Buckeye's First Time, Vague Reference To A Federal Question In An Ohio Supreme Court Motion For Reconsideration Is Insufficient To Invoke The Jurisdiction Of This Court.

When Buckeye was handed a defeat by the Ohio Supreme Court, Buckeye realized that its last hope of avoiding the trial court judgments entered against it -- affirmed in all respects by the Ohio Supreme Court -- was to seek a writ of certiorari in this Honorable Court. Buckeye also realized that this Honorable Court would not entertain its certiorari petition because no federal question was ever presented anywhere in the Record.

The Record reveals, without equivocation, that Buckeye raised no federal question: (1) in any evidence, motion, or brief filed in the state trial court; (2) in any brief filed in the state court of appeals; or (3) in any brief tendered to the Ohio Supreme Court. No court decision in this action -- whether by the trial court, by the court of appeals or by the Ohio Supreme Court -- cites the Constitution of the United States, any federal statute or any decision of any federal court. No court decision in this litigation addresses any federal question -- much less decides any issue on the basis of federal law.

Buckeye properly concluded that the Record was completely devoid of any federal issue. Faced with this reality, Buckeye then did what it felt forced to do. Buckeye manufactured a federal question out of whole cloth in a motion for reconsideration filed with the Ohio Supreme Court on October 31, 1994.

Buckeye's motion for reconsideration was predicated on both state and federal grounds. On the federal side, Buckeye claimed, without one iota of support: (1) that the Ohio Supreme Court and/or the Ohio court of appeals did not pass on each of its assigned errors, thereby somehow offending the due process clause of the United States Constitution; (2) that the Ohio Supreme Court's affirmation of the jury's unanimous finding of insurer bad faith somehow violated "any extant notion of fundamental fairness"; and (3) that the Ohio Supreme Court's acceptance of jurisdiction was unusual, and could not "be squared with the most rudimentary principles of due process."

Buckeye claims that some vague federal "issues", created by Buckeye for the first time after it lost a pure state law case in the Ohio Supreme Court, constitutes a proper predicate for seeking a writ of certiorari in this Honorable Court. Buckeye's claim is vacuous.

III. The Ohio Supreme Court Never Decided Any Federal Issue.

Buckeye **first** sought to raise a federal question, pursuant to its motion for reconsideration. This was not sought until after the Ohio Supreme Court decided against Buckeye on the merits of this bad faith insurance litigation. The Ohio Supreme Court disposed of Buckeye's motion -- which was predicated on independent state and federal law bases -- in a single sentence: "IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied." Leber v. Smith, (1994), ____ N.E.2d ____, 71 Ohio St.3d 1423. Buckeye's petition for a writ of

certiorari should be handed the same fate by this Honorable Court because there is nothing in the Record to indicate that the Ohio Supreme Court ever considered or decided any federal issue raised by Buckeye.

In Herndon v. Georgia, 295 U.S. 441, 443, 79 L.Ed. 1530, 1532, 55 S.Ct. 794 (1934), this Court held:

> The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. [Citations omitted.]

This Court will not, in reviewing a judgment of the highest court of a state, determine a federal question which was not seasonably presented to that court, being first raised in a motion for rehearing which the state court denied without opinion. Hanson v. Denckla, 327 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958).

The Ohio Supreme Court authored no opinion in support of its denial of Buckeye's motion for reconsideration. The Court simply denied the motion, with no indication that it ever considered, much less determined, any belated federal issue crafted by Buckeye.

IV. Buckeye Cannot Establish That The Ohio Supreme Court Did Not Deny Its Motion For Reconsideration On An Independent, State Law Basis.

Buckeye's Ohio Supreme Court motion for reconsideration challenged the decision-making process and the decision-writing methodology of the Ohio Supreme Court. Buckeye's motion raised no significant federal question under color of merit. Buckeye's motion is pure speculation and conjecture as to the decision-making process. Respondents, on November 7, 1994, filed with the Ohio Supreme Court a memorandum in opposition to Buckeye's motion for reconsideration. They cited no federal statute, constitutional provision or federal court decision. Eugene Leber and Erie County opposed the granting of Buckeye's Ohio Supreme Court motion for reconsideration on independent, purely state law bases. Respondents asserted, inter alia, that petitioner failed to satisfy the operative Ohio law test for reconsideration posited in Matthews v. Matthews (1981), 450 N.E.2d 278, 5 Ohio App.3d 140, 143, mco Ohio Supreme Court Case No. 81-1533, and Ohio Supreme Court Practice Rule XI(A).

Where, as here, the highest state court declines to pass upon a federal question, it must be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show to the contrary, in this Court. Street v. New York, 394 U.S. 576, 582, 22 L.Ed.2d 572, 579, 89 S.Ct. 1354 (1969). Since Buckeye cannot affirmatively show that the Ohio Supreme Court ever reached any

federal question, the petition for a writ of certiorari must be dismissed.

Even assuming, arguendo, that the Ohio Supreme Court's denial of Buckeye's motion for reconsideration necessarily dealt with both federal and non-federal issues, the jurisdiction of this Court cannot be invoked by Buckeye. Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164, 61 L.Ed. 644, 648-649, 37 S.Ct. 318 (1916), involved a state supreme court judgment

> placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. [Citations omitted.] It has been so held in cases where the judgment rested upon a Federal ground and also upon an estoppel. [Citations and footnote omitted.] . . . [W]here the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-Federal questions. [Citations omitted.]

V. Buckeye's Petition, Like Its State Supreme Court Motion For Reconsideration, Is Built Upon An Unproven, Impermissible Presumption Anathema To The Holdings Of This Honorable Court.

Buckeye's instant petition, like Buckeye's state supreme court motion for reconsideration, is predicated upon the unproven, impermissible and erroneous presumption that its assigned errors were not subject to appellate review. Buckeye's contention is refuted by two simple, controlling points:

> **First**, every issue raised by Buckeye in the Ohio Supreme Court of Ohio was the subject of exhaustive briefing and oral argument and the thorough consideration of the Ohio Supreme Court. Every Ohio Supreme Court assignment of error posited by Buckeye was exhaustively briefed by the parties. Oral arguments revealed that the Ohio Supreme Court thoroughly reviewed the parties' briefs. The concurring opinion of Ohio Supreme Court Justice Andy Douglas expressly acknowledges the Ohio Supreme Court's "thorough examination of the record" (Petition at 10a). Buckeye does not claim, because Buckeye cannot claim, that Buckeye did not have a full and fair opportunity to be heard. Buckeye fully exercised that opportunity at every stage of the proceedings. This undeniable fact distinguishes **all** of the decisions of this Court cited in Buckeye's petition.

The Ohio Supreme Court's decision expressly reinstated "**all** of the trial court's judgments." Leber v. Smith (1994), 639 N.E.2d 1159, 70 Ohio St.3d 548, 554. (Emphasis added.)[4] By its judgment, the Ohio Supreme Court clearly concluded that it had considered and rejected: (a) Buckeye's assignments of error which, if granted, would have negated or mitigated the trial court judgments against Buckeye, and (b) certain of Respondents' assignments of error which, if granted, would have increased the amount of the trial court's judgment.[5] Buckeye's motion for reconsideration illogically presumed -- and Buckeye's instant petition continues to illogically presume -- that because the Ohio Supreme Court did not detail, in writing, its ratio decidendi with respect to every issue raised by every party that it did not, in fact,

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[4] Pursuant to Article IV, Section 2(B)(1)(f) of the Ohio Constitution, the Ohio Supreme Court has original jurisdiction "[i]n any cause on review as may be necessary to its complete determination." This provision took effect on May 7, 1968, superseding the Winslow v. Ohio Bus Line Co., 73 N.E.2d 504, 148 Ohio St. 101 (1947), decision relied upon by Buckeye (Petition at 14, n. 7) by a generation. Pursuant to Article IV, Section 2(B)(2)(d) of the Ohio Constitution, "[i]n cases of public or great general interest, the Supreme Court . . . may review and affirm, modify or reverse the judgment of the court of appeals." The Ohio Supreme Court acted, in the instant case, completely within its constitutional authority.

[5] Buckeye neglects to mention that the Ohio Supreme Court judgment was also adverse to Respondents. For example, the Ohio Supreme Court rejected Respondents' claim that the $2 million setoff which the trial court granted Buckeye was erroneous.

consider and determine each such issue. Buckeye's reasoning is a patent non sequitur.[6]

Second, in order to create a federal question, it would be necessary for Buckeye to establish facts that are completely unsupported by the Record, to wit, that the Ohio Supreme Court: (a) never read Buckeye's briefs; (b) ignored Buckeye's oral arguments; (c) failed to consider the issues raised by Buckeye; and (d) somehow violated Buckeye's federal due process rights and the Ohio Supreme Court's federal due process duties. To accept Buckeye's proposition, this Court would be required to embark on a path of second-guessing the decision-making processes and decision-writing methods of every decision penned by every state Supreme Court. The Ohio Supreme Court not only considered all of the issues raised by the parties, it decided them fairly and in full compliance with all federal substantive and procedural due process mandates.

Buckeye claims that the Ohio Supreme Court did not pass on all of its assigned errors. But, this ignores:

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[6] Under Ohio law, a motion not expressly ruled upon is presumed overruled. Newman v. Al Castrucci Ford Sales, Inc. (1988), 561 N.E.2d 1001, 54 Ohio App.3d 166, 169, mco ____ N.E.2d ____, 41 Ohio St.3d 725. The same certainly holds true for assigned errors posited in the Ohio Supreme Court.

(1) the Ohio Supreme Court's rejection of Buckeye's motion for reconsideration[7]; and (2) the time-honored presumptions of judicial integrity and regularity. As this Court noted in Long Sault Development Co. v. Call, 242 U.S. 272, 277, 61 L.Ed. 294, 300, 37 S.Ct. 79 (1916), this Court will give a decision of the highest court of a state

> that respect and sympathetic attention which is always due to the highest courts of a state, with the presumption always in mind that the state court will do what the Constitution and the laws of the United States require. [Citations omitted.]

Simply put, this Court is bound to presume: (1) in favor of proceedings in a court having jurisdiction; and (2) that justice was administered in the ordinary form. Stickton v. Bishop, 4 How. 155, 165, 11 L.Ed. 918, 923 (1846). Error may not be presumed. Error must be affirmatively shown. All doubts must be resolved in favor of the judgment rather than against it. Merryman v. Bourne, 9 Wall. 592, 600, 19 L.Ed. 683, 686 (1869). Any inferences from the silence of the record must be drawn against the party who bears the burden of persuasion -- in this case, Buckeye. International Milling Co. v. Columbia Transp. Co., 292 U.S. 511, 516, 78 L.Ed. 1396, 1399, 54 S.Ct. 797 (1933). Accord, Bechtel v. United States, 101 U.S. 597, 600-601, 25 L.Ed. 1019, 1021 (1879). As this Court explained in United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 100 L.Ed. 1331, 1338, 76 S.Ct. 965 (1956):

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[7] The Ohio Supreme Court obviously concluded that there was no reason for it to reconsider issues which it had already properly decided.

> While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation, but as a demonstrable reality."

Buckeye's petition sub judice -- like its Ohio Supreme Court motion for reconsideration -- runs afoul of these holdings and of a number of other fundamental presumptions of this Court. In Lutz v. Linthicum, 8 Pet. 165, 180, 8 L.Ed. 904, 910 (1834), this Court held:

> We are bound to presume, in the absence of all evidence to the contrary, that all things were rightfully and regularly done by the court [below], and that the parties were fully heard upon all matters properly in judgment.

In Ventress v. Smith, 10 Pet. 161, 171, 8 L.Ed. 382, 386 (1836), this Court explained:

> It is incumbent on the plaintiff [in error] to make out the error clearly and satisfactorily; every reasonable intendment should be made in favor of the judgment . . . .

In Loring v. Frue, 104 U.S. 223, 224, 26 L.Ed. 713 (1881), this Court observed:

> It is a principle equally well settled in law and necessary in the administration of justice, that in cases heard in an appellate court on a writ of error, only such errors as are plainly made to appear can be grounds for reversal, and that every presumption consistent with the record of the case is to be made in favor of the action of the inferior court.

It is undisputed that the Ohio Supreme Court had jurisdiction over the parties and over the subject matter of this action. The judgment of the Ohio Supreme Court must be presumed correct and in full compliance with federal due process mandates unless and until the contrary is clearly shown by evidence in the record. Buckeye has not made, and cannot make, any such showing.

This is as it must be. Otherwise, this Court would be required to exercise supervisory authority over the highest courts of the several states in order to insure that each decision articulates, in writing, the basis of the court's disposition of every issue raised by every party in order to comport with some disgruntled litigant's inevitable, vague, federal due process challenge. Here, Buckeye asks this Court to review the issue of whether the Ohio Supreme Court gave sufficient attention to Buckeye's assigned errors. To justify the review sought by Buckeye, this Court would, for the first time in 200 years, commit itself to determining whether every Supreme Court decision of every state court was **adequately** considered.

VI. Buckeye Failed To Raise The Federal Question At Its First Opportunity.

The Ohio Supreme Court has denied motions for reconsideration predicated on the very same denial-of-due-process contention posited by Buckeye. In Freeman v. Norfolk & Western Ry. Co. (1994), 635 N.E.2d 310, 69 Ohio St.3d 611, mot. reconsid. den. ___ N.E.2d ___, 70 Ohio St. 1439, the Ohio Supreme Court rejected a motion for reconsideration raising the identical issue raised by Buckeye. The Ohio Supreme Court denied reconsideration in Freeman, supra, on September 7, 1994 -- six weeks before the court issued its decision on the merits in the instant cause.

Yet Buckeye never sought to supplement its merits briefs in order to address the Ohio Supreme Court's denial of reconsideration in Freeman. Buckeye's omission is fatal. As this Honorable Court held in Herndon v. Georgia, supra, 295 U.S. at 444, 79 L.Ed. at 1534:

> Appellant, of course, cannot plead ignorance of the ruling in the [prior] case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction.

VII. The Ohio Supreme Court Had In Personam And Subject Matter Jurisdiction.

Whatever the historic course of the Ohio Supreme Court's final review, it was charted by Buckeye. Buckeye successfully moved the Ohio Supreme Court for a pre-merits remand, and then contended, with initial success, that the Ohio Supreme Court should not reassume jurisdiction after the appellate court fulfilled its remand instructions. In any event, Buckeye thoroughly briefed and argued its position on the Ohio Supreme Court's invocation of jurisdiction in its Ohio Supreme Court merit briefs and oral argument, without any hint of any federal question. The Ohio Supreme Court obviously considered and rejected Buckeye's views on a purely state law basis. Buckeye does not dispute, nor can Buckeye dispute, that the Ohio Supreme Court had in personam and subject matter jurisdiction in this purely state law action. There is no colorable federal law basis for any Buckeye challenge to the Ohio Supreme Court's exercise of jurisdiction.

CONCLUSION

This Court has explicitly held that it will not review whether the decisions of state courts on state law issues are right or wrong. Enterprise Irrigation Dist., supra, 243 U.S. at 164. This is neither the function of the United States Supreme Court, nor within this Court's jurisdiction.

A review on writ of certiorari is a matter of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefor. Rule 10.1 of this Honorable Court indicates the character of the reasons that will be considered: (1)

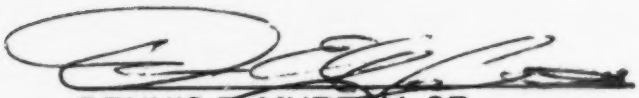
when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; and (2) when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. The principle purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385, 391 (1991). This Court wisely utilizes its time and its talent to address significant, fundamental issues of federal law, impacting on the basic rights of a large segment of, if not all, the citizenry.

None of the special or important reasons for issuing a writ of certiorari are present here. The precious commodity of time should not be squandered on a fact-specific action involving state issues only, which: (1) has been exhaustively litigated for 16 years; (2) has concluded with jury determinations of insurance company misconduct, rising to the level of actual malice affirmed by the state court of last resort; (3) involved an 18 year-old (now 34) permanently paralyzed by a negligent shooting; and (4) has been afforded complete review, including an Ohio Supreme Court merits review. This Court should continue to direct its energies to the adjudication of significant federal statutory and Constitutional issues of national concern such as knock-before-entering searches and high school drug testing.

In the well-nigh impossible event that this Court determines to entertain jurisdiction, this Court should establish a full briefing schedule. Full merits briefing would be necessary because of the factual intracacies and procedural complexities resulting from sixteen years of litigation and the obvious justice accorded Buckeye over the entire duration of this action by Ohio's trial, appellate and supreme courts.

Throughout the lengthy history of this action, the Ohio courts extended to Buckeye, and Buckeye exercised, a full and fair opportunity to be heard. Buckeye was **not** denied appellate review. All matters which Buckeye sought to raise in the Ohio Supreme Court were considered by and decided by the Ohio Supreme Court in its October 19, 1994 judgment. Buckeye's claim of denial of federal due process was meritless and Buckeye's motion for reconsideration was properly denied by the Ohio Supreme Court on purely state law grounds. This matter has been the subject of intensive state court litigation for 16 years. The bad faith, malicious conduct of Buckeye should be at an end, now. Buckeye's petition for a writ of certiorari is not well taken and should be denied.

Respectfully submitted,



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April 1995

APPENDIX 1

IN THE COMMON PLEAS COURT OF
ERIE COUNTY, OHIO

Eugene A. Leber, et al.,	CASE NO. 45270
	James L. McCrystal,
Plaintiffs,	Judge
-vs-	JUDGMENT ENTRY
Steven A. Smith, etc., et al.,	Trial: July 17, 1984
Defendants.	

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This cause came on to be heard on the several motions of the defendants for summary judgment and stay of the proceedings, the pleadings, the evidence in the form of depositions and affidavits, and the memoranda and oral arguments of counsel; and upon consideration thereof, the Court finds and orders as follows:

1. That the motion filed on behalf of defendants J. Philip Gasteier, James C. Dee, and Alvin J. Vaith, individually, should be sustained; that summary judgment in favor of said individual defendants should be and hereby is granted; and that this cause should be, and hereby is, dismissed as to said defendants, in their individual capacity only.

2. That the motions filed on behalf of the Board of Erie County Commissioners of Erie County, Ohio, and the other defendants herein should be and hereby are denied, except as herein otherwise provided.

3. That there is no evidence to support the claims of negligence asserted against defendant Board of County Commissioners in paragraphs 12, 13, or 14 of the amended complaint as to the alleged failure to declare a vacancy in the office of Sheriff of Erie County pursuant to Revised Code Section 305.03 or Section 305.02; however, the Board of County Commissioners of Erie County, Ohio, is liable under the doctrine of respondeat superior for the negligence, if any, of the Sheriff of Erie County, Ohio, and/or his deputies which proximately contributed to cause the plaintiff's injuries; and that the motion of defendant Board of County Commissioners for summary judgment should be overruled.

4. That issues of fact exist for the determination of the jury as to:

A) The negligence, if any, of defendant Steven A. Smith as a proximate contributing cause of plaintiff's injuries;

B) The negligence, if any, of Sheriff Harold Gladwell as a proximate contributing cause of plaintiff's injuries or under any applicable statute;

C) The negligence, if any, of plaintiff Eugene A. Leber as a proximate contributing cause of his injuries;

D) Damages;

E) Damages suffered by the parents, if any, for consortium or expenses.

5. That the claim for punitive damages asserted by the plaintiffs should be and hereby is dismissed as to all defendants, except defendant Steven A. Smith.

6. That defendants' motion to stay these proceedings be denied; and that the trial of this cause commenced on July 17, 1984, on the issues specified in paragraphs 4 and 5 hereof.

7. The Court hereby expressly authorizes filing of the second amended complaint by plaintiffs on July 17, 1984.

IT IS SO ORDERED.

/s/ James L. McCrystal
James L. McCrystal

APPENDIX 2

IN THE COURT OF COMMON PLEAS, ERIE COUNTY, OHIO

EUGENE A. LEBER, et al.,

Plaintiffs, CASE NO. 45270

-vs-

ERIE COUNTY,

Defendant

FILED
Common Pleas Court
July 27, 1984
Colette A. Crouch, Clerk
Erie County, Ohio

INTERROGATORY NO. 1

What is the total monetary amount which will fairly compensate plaintiff, Eugene A. Leber, for injuries and damages proximately caused by the accident?

State the amount in dollars $ 10,240,000

*In making this determination, you will disregard the negligence of any party.

1. /s/ Juror _____ 5. /s/ Juror _____

2. /s/ Juror _____ 6. /s/ Juror _____

3. /s/ Juror _____ 7. /s/ Juror _____

4. /s/ Juror _____ 8. /s/ Juror _____

INTERROGATORY NO. 2

What is the total monetary amount which will fairly compensate Richard and June Leber for loss of consortium and expenses proximately caused by the accident?

State the amount in dollars $ 150,000

*In making this determination, you will disregard the negligence of any party.

1. /s/ Juror _____ 5. /s/ Juror _____

2. /s/ Juror _____ 6. /s/ Juror _____

3. /s/ Juror _____ 7. /s/ Juror _____

4. /s/ Juror _____ 8. /s/ Juror _____

IN THE COURT OF COMMON PLEAS, ERIE COUNTY, OHIO

EUGENE A. LEBER, et al.,
Plaintiffs,

CASE NO. 45270

-vs-

ERIE COUNTY,
Defendant

FILED
Common Pleas Court
July 27, 1984
Colette A. Crouch, Clerk
Erie County, Ohio

INTERROGATORY NO. 3

What is the percentage of negligence that directly and proximately caused the injury that is attributable to each party, the total of all parties' negligence being equal to 0 or 100%.

Eugene Leber 0 %

Erie County Sheriff 65 %

Deputy Sheriff Steven Smith 35 %

*If you find by a preponderance of the evidence that the act or failure to act of any party was not negligence directly and proximately causing the injury, then you will show that party's percentage as zero.

1. /s/ Juror
2. /s/ Juror
3. /s/ Juror
4. /s/ Juror
5. /s/ Juror
6. /s/ Juror
7. /s/ Juror
8. /s/ Juror

APPENDIX 3

IN THE COURT OF COMMON PLEAS OF
ERIE COUNTY, OHIO

Eugene Leber, et al. Plaintiffs, vs. The Buckeye Union Insurance, et al., Defendants.	CASE NO. 45270 Judge George J. McMonagle JUDGMENT ENTRY FILED 1987 AUG 10 PM 12:17 ERIE COUNTY COMMON PLEAS COURT

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Following the presentation of all of the evidence to the Court and Jury, this action came before the Court on the seventh cause of action asserted by the plaintiffs, which seeks a declaratory judgment as to the rights and obligations of the parties pursuant to the contract of insurance issued by the Buckeye Union Insurance Company on October 29, 1978. This seventh cause of action was originally instituted as a separate declaratory judgment proceeding and was subsequently consolidated with and into this action.

Having listened attentively to the presentation of the evidence and the arguments of counsel and having reviewed the memoranda submitted by the parties, this Court, for the reasons set forth in its oral opinion, rendered August 7, 1987, ORDERS, ADJUDGES and DECREES as follows:

For purposes of the insurance policy issued by the Buckeye Union Insurance Company on October 29, 1978, the terms Board of Erie County Commissioners and Erie County are synonymous. Steven A. Smith is an employee of Erie County and the Board of Erie County Commissioners. Both Steven A. Smith and the Erie County Sheriff are insureds under the policy of insurance issued by the Buckeye Union Insurance Company. The injuries sustained by Eugene Leber on April 7, 1979, were the result of two occurrences for purposes of the Buckeye Union Policy: (1) the negligent training of Deputy Smith by the Erie County Sheriff and (2) the negligent conduct of Deputy Smith resulting in the shooting. Part VI of the Buckeye policy, as a result of these two occurrences, provides a total of $2,000,000.00 in applicable insurance coverage: $1,000,000.00 for the negligent training of Smith by the Erie County Sheriff and $1,000,000.00 for the negligent conduct of Deputy Smith resulting in the shooting of Eugene Leber. Alternatively, in the event that only $1,000,000.00 of insurance proceeds is ultimately determined, as a result of appellate review, to be owing under Part VI of the policy, this Court determines that Part V of the policy applies in that there is a reasonable causal connection between Deputy Smith's use of the Sheriff's Department cruiser and injuries sustained by Eugene Leber. The injuries

sustained by Eugene Leber resulted, at least in part, from the use of the Sheriff's Department cruiser by Deputy Smith, providing $1,000,000.00 of applicable coverage under Part V of the policy in the event it is determined that there were not separate occurrences under Part VI of the policy. Accordingly, judgment is hereby entered against the Buckeye Union Insurance Company and in favor of plaintiffs in the sum of $2,000,000.00.

Pursuant to the contract of insurance, the Buckeye Union Insurance Company is liable to plaintiffs for interest at 10% per annum on the full amount of the $10,150,000.00 judgment, having failed to deposit or tender its applicable policy limits. Accordingly, judgment is hereby entered against the Buckeye Union Insurance Company and in favor of the plaintiffs in the sum of $2,712.33 per day from August 7, 1984 until the payment to plaintiffs of the $2,000,000.00 in insurance proceeds by the Buckeye Union Insurance Company. (As of August 10, 1987, this interest amount totals $2,978,138.34).

The Court further finds that the Settlement Agreement of March 19, 1986, constituted a proper assignment of insurance proceeds and legal claims to the Lebers. The Court specifically reserves judgment on plaintiffs' request for prejudgment interest and attorney fees pending the return of a verdict by the jury.

IT IS SO ORDERED.

/s/ George J. McMonagle
The Honorable George J. McMonagle

APPENDIX 4

Revised Code, Sec. 2315.13

VERDICT FOR PLAINTIFFS

Court of Common Pleas, Erie County, Ohio

Eugene A. Leber and The Board of Erie County Commissioners,et al.	)	_____ Term, A.D. 1987
	)	No. 45270
vs. Plaintiffs	)	Civil Action--Verdict for Plaintiffs Against Buckeye Union Insurance Company
Buckeye Union Insurance Company, et al., Defendants	)	

We, the Jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the Plaintiffs, and assess the amount due to the Plaintiffs from the Defendant Buckeye Union Insurance Company as ($10,150,000.00) Ten Million One Hundred Fifty Thousand Dollars, plus interest at the legal rate from August 7, 1984, plus additional compensatory damages of ($ None) Dollars.

And we do so render our verdict upon the concurrences of six (6) or more members of our said

jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this 13 day of August 1987.

1. /s/ Allan C. Weilnau
2. /s/ Sharol S. Sponsler
3. /s/ Margaret Manion
4. /s/ Carol Fleming
5. /s/ Thomas Kingsborough
6. /s/ Eugene Weyer
7. /s/ Judith L. Ashaki
8. /s/ Mary K. Lentz

We, the Jury, further assess the amount due to the Plaintiffs from the Defendant, Buckeye Union Insurance Company, as punitive damages ($ NONE) Dollars.

INTERROGATORY NO. 3

Do you find, by a preponderance of the evidence, that the Buckeye Union Insurance Company's conduct in failing to settle the Leber's claims was motivated by actual malice.

Yes __X__ No _____

Signed by:

1. _____
2. _____
3. /s/ Margaret Manion
4. /s/ Carol Fleming
5. /s/ Thomas Kingsborough
6. /s/ Eugene Weyer
7. /s/ Judith L. Ashaki
8. /s/ Mary K. Lentz

INTERROGATORY NO. 4

Do you find, by a preponderance of the evidence, that the Buckeye Union Insurance Company's conduct at any time imported a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud or embracing actual intent to mislead or deceive another.

Yes __X__ No _____

Signed by:

1. /s/ Allan C. Weilnau
2. /s/ Sharol S. Sponsler
3. /s/ Margaret Manion
4. /s/ Carol Fleming
5. /s/ Thomas Kingsborough
6. /s/ Eugene Weyer
7. /s/ Judith L. Ashaki
8. /s/ Mary K. Lentz